2006

State of Utah v. Michael W. Dennis : Brief of Appellee

Utah Court of Appeals

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Case No. 20060416-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Michael W. Dennis,
Defendant/Appellant.

Brief of Appellee

Appeal from an interlocutory order suppressing evidence in the Seventh Judicial District Court of Utah, Carbon County, the Honorable Scott N. Johansen presiding

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Oral Argument Requested

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STATEMENT OF JURISDICTION

Defendant appeals from an interlocutory order suppressing evidence. This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (2002).

STATEMENT OF THE ISSUES

1. Did the officers exceed the permissible scope of the stop by questioning the driver about his earlier presence in an area frequented by drug dealers?

Standard of Review. A trial court's ruling on a motion to suppress is reviewed for correctness, including its application of the law to the facts. *State v. Brake*, 2004 UT 95, ¶ 15, 103 P.3d 699. The trial court's underlying factual findings are reviewed for clear error. *State v. Krukowski*, 2004 UT 94, ¶ 11, 100 P.3d 1222.

2. Was the officer justified in conducting a roadside search of defendant's coin purse, where drug paraphernalia was found in the truck, defendant made furtive gestures in his pocket, and defendant smelled of marijuana smoke?

Standard of Review. Same as in issue 1.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. amend IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. SUMMARY OF PROCEEDINGS

Defendant was arrested and charged with (1) possession of methamphetamine with intent to distribute by a restricted person, a first degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iv) (West 2004); (2) possession of marijuana with intent to distribute by a restricted person, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iv) (West 2004); (3) unlawful possession of a schedule I or schedule II narcotic by a restricted person, a second degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a) (West 2004); and (4) possession of drug paraphernalia by a restricted person, a class A misdemeanor, in violation of Utah Code Ann. § 58-37a-5 (West 2004). R. 1-2. Defendant was released after posting bond, but after he failed to appear for a scheduled proceeding,

a bench warrant was issued for defendant's arrest. R. 10-13. Defendant moved to suppress the evidence seized. *See* R. 14-17. Following an evidentiary hearing, the trial court denied defendant's motion. R. 14-17. Defendant filed a petition for interlocutory appeal and this court granted the petition. *See* R. 19-20, 26-27; Order dated June 12, 2006.

B. SUMMARY OF FACTS[1]

At 3:00 a.m. on October 18, 2005, Officers Trent Anderson and Lynn Archuletta were parked "car-to-car," facing opposite directions, at the front entrance of a local business in Helper City. R. 37: 4-5, 22 (R. 14). As the two officers conversed, Officer Anderson saw a black pickup truck slow to approximately five miles per hour at a stop sign down the street, then proceed through the intersection without stopping. R. 37: 5-6 (R. 14). As the pickup truck then proceeded past the officers on State Road 6 (SR6), Officer Anderson saw a crack in the windshield. R. 37: 5, 22 (R. 14). Officer Archuletta had seen the truck about two hours earlier at the Riverside Motel— an area local police "were dealing with on an almost daily basis with narcotics users and dealers". R. 37: 6, 22, 31, 38-39 (R. 14). Some seventeen felony drug arrests had been made at that location. R. 37: 22, 31.

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[1] The facts are taken from the suppression hearing and Officer Anderson's video of the stop, which was played at the suppression hearing and is part of the record on appeal. The video is cited with a "V" followed by the time as reflected in the video, e.g., V3:06:02. Parenthetical citations refer to the trial court's findings on the matter as set forth in its Order on Motions to Suppress, R. 14-17, a copy of which is included in the Addendum.

As Officer Anderson prepared to leave to initiate a traffic stop, Officer Archuletta advised him that he had seen the truck earlier at the motel. R. 37: 6 (R. 14). Officer Anderson pulled out of the parking lot, activated his red and blue lights, and stopped the truck about a half mile down the road. R. 37: 6-7, 12, 22; V3:06:02 (R. 15). He recognized both occupants in the truck: Brian Straugh, the driver, and defendant Mike Dennis, the passenger. R. 37: 6-7 (R. 15). Officer Anderson had dealt with both in the past and was aware that they had been involved in drugs and burglaries or thefts. R. 37: 7, 18-19.

After obtaining Straugh's driver's license, registration, and insurance documents, Officer Anderson returned to his patrol car. R. 37: 7, 15; V3:07:40. He requested assistance from Officer Archuletta and attempted to run a computer check. R. 37: 7, 23 (R. 15). Officer Archuletta arrived shortly thereafter. R. 37: 7 (R. 15). When Officer Anderson could not establish a link on the computer, he requested that dispatch run the checks. R. 37: 7-8, 15 (R. 15). While they waited for dispatch to run the checks, Officer Archuletta told Officer Anderson that when he saw Straugh at the motel, "they were up fixing something underneath and doing something there at the driver's door." V3:13:42. After an eight minute wait, dispatch reported that the license and vehicle information was valid and that there were no outstanding warrants. R. 37: 7-8, 15; V3:07:40-3:15:20 (R. 15).

The two officers returned to the pickup truck, Officer Anderson approaching at the driver side door and Officer Archuletta approaching at the passenger side

door. R. 37: 7-8; v3:15:30 (R. 15).[2] Officer Anderson asked Straugh about his activities and purpose at the Riverside Motel. R. 37: 16-17; v3:15:37 (R. 15). While conversing with Straugh, Officer Anderson observed an unhooked stereo amplifier on the floor and asked Straugh what it was for. R. 37: 8; v3:16:18-23. The amplifier raised his suspicions because both men had been involved in burglaries or thefts in the past and amplifiers are usually hooked up. R. 37: 9, 16, 20, 26.

Officer Archuletta also saw the unhooked amplifier on the floorboard. R. 37: 25-26. But in addition, he saw some Zig-Zag rolling papers, commonly used to roll marijuana cigarettes, on the armrest of the driver side door. R. 37: 9, 25, 29, 36-37. Officer Archuletta alerted Officer Anderson to the rolling papers. R. 37: 9, 13, 29. When Officer Anderson looked down to see them, he also saw a tubular, bright green object lying underneath them, which he believed to be a "narcotic paraphernalia item." R. 37: 9, 26; v3:17:39 (R. 15). He asked Straugh what it was, indicating that " it looks like a marijuana pipe." v3:17:49. After a brief discussion about the pipe, Officer Anderson asked Straugh to step out of the vehicle so that he could retrieve the paraphernalia. R. 37: 9; v3:19:05 (R. 15)

Straugh exited and walked to the back of the truck, where Officer Anderson frisked him for weapons. v3:19:11-19:50. Finding no weapons, Officer Anderson

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[2] Officer Archuletta originally believed that he had approached the pickup truck and spoke with the occupants while Officer Anderson waited at his patrol car for the license and vehicle checks. R. 37: 23, 29. However, after viewing the video tape of the incident, recorded from Officer Anderson's vehicle, he acknowledged that the two officers approached the vehicle together. R. 37: 35; video.

returned to the driver side door and, after receiving permission from Straugh, retrieved the rolling papers. V3:19:52. Officer Anderson then asked defendant what was in his black bag. V3:20:08. Defendant said he had his "money and stuff like that." V3:20:12. Apparently, he also denied having any drugs in the bag, to which Officer Anderson replied, "Well, let's pull the dog out and see." V3:20:16. Defendant responded to "pull the dog out." V3:20:18. Officer Anderson then shined his flashlight into the car and saw on the floorboard small plastic baggies, which are also common with narcotics usage. R. 37: 9; V3:20:25 (R. 15). After asking Straugh about the plastic baggies, Straugh retrieved them for the officer and told him they were for speaker parts. R. 37: 9; V3:20:25. Straugh then returned to the back of the truck and Officer Anderson questioned him further. V3:20:35-21:32.

Officer Anderson returned to the driver side door of the pickup truck and looked inside with the aid of his flashlight. V3:21:33. Then, Officer Anderson engaged in a brief conversation with defendant about his connection to the paraphernalia and evasive behavior:

Officer Anderson:	Mike, you know what, you've been convicted of dope before. Okay? Don't try to fool us.
Defendant:	I ain't done nothing. That's what I'm saying.
Officer Anderson:	I've been finding all kinds of paraphernalia in here.
Defendant:	[unintelligible] . . . a ride home."
Officer Anderson:	Well, obviously, you're being evasive about something, Mike.

V3:21:42. Officer Anderson, as well as Officer Archuletta, conversed with defendant for a few more seconds, in which they discussed, among other things, the officer's belief that defendant was "involved in the game" and the presence of the "rolling papers." V3:21:56. Officer Anderson then returned to the back of the pickup truck, where he further questioned Straugh and even asked that he show him how he used the rolling papers. V3:22:23-24:12.

Meanwhile, Officer Archuletta continued to question defendant. Defendant would not look at Officer Anderson when he talked to him. R. 37: 10. But when Officer Archuletta engaged in conversation with him, defendant became defensive. R. 37: 10. At some point during their conversation, Officer Archuletta saw defendant, who was still seated in the truck, move "a black looking basket weave leather" object from one side of the pocket of his hoody to the other side. R. 37: 24-25 (R. 15). Knowing that defendant was a "convicted felon," and concerned that the black object could be a knife handle, gun handle, or a gun holster, Officer Archuletta asked defendant what it was, but defendant would not tell him. R. 37: 24-25, 28, 37. Officer Archuletta asked defendant to take his hands out of his pocket, but again, defendant refused. R. 37: 24, 27-28.[3]

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[3] Officer Archuletta testified that officers are trained that when they suspect someone is armed, the first thing they should do is to instruct the suspect to show his or her hands, not ask if they have a weapon. R. 37: 28.

Officer Anderson returned to the driver side door. V3:24:10. Officer Archuletta asked defendant to "prove me wrong." V3:24:17. Officer Anderson asked defendant whether he had any weapons on him. V3:24:19. Officer Archuletta then asked defendant to exit the pickup truck so that he could search him for weapons and Officer Anderson likewise told defendant to "come on out." R. 37: 9, 24, 39; V3:24:21. Because the passenger side door would not open, defendant exited through the driver side door and was escorted to the rear of the vehicle next to Straugh. R. 37: 9-10; V3:24:33.

As defendant walked back to the rear of the truck, he placed his hand back into his pocket. R. 37: 10; V3:24:39. Officer Anderson told defendant three times to take his hand out of his pocket before he removed his hand. R. 37: 10; V3:24:40. Officer Anderson then asked him to place his hands behind his back so he could "pat him down" for weapons. R. 37: 10. As he patted him down, Officer Anderson could smell "a real pugnant odor of marijuana" on defendant's person. R. 37: 10. During the pat down, Officer Archuletta removed the black object from defendant's pocket and discovered that it was a small black leather coin purse. R. 37: 26-27; V3:25:18. Officer Archuletta then opened the coin purse and discovered "some marijuana, some methamphetamine, and some pills." R. 37: 10-11, 26; V3:25:21. Officer Anderson then handcuffed defendant and a further search of his pockets uncovered marijuana pipes in his pockets. R. 37: 11; V3:25:25.

After taking defendant into custody, the officers searched the pickup truck. R. 37: 11. Officer Anderson retrieved the baggies on the floorboard and additional baggies under the "boot shifter" of the stick shift. R. 37: 11. All of the baggies were empty but one, which contained a large rock consistent with crystal methamphetamine. R. 37: 11.

SUMMARY OF ARGUMENT

I. Scope of Detention. Defendant contends that the officers' questioning of the driver and defendant was not permissible because the officers did not observe the paraphernalia or amplifier until after their inquiry into drugs began. Contrary to defendant's claim, the officers were justified in questioning the men about drug use. The officers knew both men had histories of drug involvement, the pickup truck they were driving was just two hours earlier in a location frequented by drug dealers, and the men were seen doing something at the driver's door—a place where drugs are often concealed. These facts supported a reasonable suspicion justifying the officers' questioning the men about drugs.

II. Coin Purse Search. Defendant also contends that the search of the coin purse was not justified as a weapons search. The State agrees. However, following the frisk, the officers had probable cause to believe that defendant was concealing drugs and that he was using or in possession of drugs. Mere presence in a car for which there is probable cause is not sufficient to justify the search of a passenger. However, the officers relied on more than defendant's mere presence. When the officers discovered that defendant had no weapons, they could reasonably infer that

defendant's furtive movements were an attempt to conceal drugs on his person. Moreover, the officer conducting the frisk smelled the odor of marijuana on defendant's person. These factors, together with the presence of the drug paraphernalia in the truck, created probable cause to believe defendant was concealing contraband. The officers were thus justified in extending the automobile search to defendant. In addition, the officers had probable cause to arrest defendant for drug possession or use. Because the search was contemporaneous with defendant's arrest, the search of the coin purse was also justified as incident to arrest.

ARGUMENT

I. THE OFFICERS DID NOT EXCEED THE PERMISSIBLE SCOPE OF THE DETENTION BY QUESTIONING THE DRIVER ABOUT HIS EARLIER PRESENCE AT AN AREA FREQUENTED BY DRUG DEALERS

Defendant argues that the officers exceeded the permissible scope of the stop when they continued to question him and Straugh after dispatch reported that Straugh's driver's license was valid, his registration and insurance were current, and the two had no outstanding warrants. Aplt. Brf. at 10-14. He contends that rather than questioning the two, the officers should have permitted them "to proceed on their way without further questioning." Aplt. Brf. at 11-12. Contrary to defendant's claim, the officers did not exceed the permissible scope of the stop.

In determining whether a traffic stop is reasonable under the Fourth Amendment, the Court inquires first, whether "the police officer's action [was]

'justified at its inception,'" and second, whether "the resulting detention [was] 'reasonably related in scope to the circumstances that justified the interference in the first place.'" *State v. Lopez*, 873 P.2d 1127, 1131-32 (Utah 1994) (quoting *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968)). In this case, defendant has not challenged the officer's action in stopping defendant, nor could he. *See* Aplt. Brf. at 10-17. Officer Archuletta saw defendant drive through an intersection without stopping at the stop sign. R. 37: 5-6 (R. 14). As held in *Lopez*, "[a]n observed traffic violation gives the officer 'at the least, probable cause to believe the citizen had committed a traffic offense.'" 873 P.2d at 1132 (quoting *State v. Smith*, 781 P.2d 879, 882 n.2 (Utah App. 1989)). The only question on appeal, therefore, is whether the ensuing detention was justified. The district court correctly ruled that it was.

"Once a traffic stop is made, the detention 'must be temporary and last no longer than is necessary to effectuate the purpose of the stop.'" *Id.* (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)). In conducting a traffic stop, officers "may request a driver's license and vehicle registration, conduct a computer check, and issue a citation." *Id.* But "[o]nce the purpose of the initial stop is concluded, . . . the person must be allowed to depart." *State v. Hansen*, 2002 UT 125, ¶ 31, 63 P.3d 650. Further questioning is not justified "unless an officer has probable cause or a reasonable suspicion of a further illegality." *Id.* The officers had that here.

Upon returning to the pickup truck, Officer Anderson questioned Straugh about his presence at the Riverside Motel parking lot. R. 37: 16-17; v3:15:37 (R.15). This questioning was supported by several factors which, when viewed together,

created reasonable suspicion that Straugh and defendant may have been involved in a theft or burglary or some kind of drug transaction. First, both officers were aware of the two men's prior involvement with drugs and thefts. R. 37: 7, 18-19, 23. Officer Anderson had "dealt" with both men in the past and "kn[ew] them to be into narcotics and into burglaries" or thefts. R. 37: 7, 18-19.[4] Officer Archuletta was likewise aware of their criminal histories involving "[n]arcotics, burglaries, [and] thefts." R. 37: 23. Second, the two men were seen earlier at the Riverside Motel—an "area, at the time, [officers] were dealing with on an almost daily basis with narcotics users and dealers." R. 37: 6. Third, defendant was evasive with Officer Anderson when he first talked to them after making the stop. Defendant "wouldn't even look at [Officer Anderson] when [he] was talking to him." R. 37: 10; V3:12:42. And fourth, Officer Archuletta had seen them earlier "doing something there at the driver's door." V3:13:42. This was a significant factor because drugs are often concealed in car doors. *See Bustamante v. State*, 917 S.W.2d 144, 145 (Tex. App. 1996) (observing that "[t]he two officers knew from their experience and intelligence reports that a car door is a place commonly used to conceal contraband"); *People v. Olivas*, 859 P.2d 211, 216 (Colo. 1993) (observing that "[a]n experienced law enforcement officer might reasonably believe that the area behind a loose door panel

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[4] From Officer Anderson's testimony at the suppression hearing, it appears that he was aware of the thefts or burglaries only through past criminal histories. *See* R. 37: 17-19.

is a likely place to hide contraband while it is being transported on interstate highways").

The foregoing factors, viewed separately, would not create reasonable suspicion. However, as recently reiterated by the Utah Supreme Court, "courts may not use a 'divide-and-conquer analysis.' In other words, courts cannot evaluate individual facts in isolation to determine whether each fact has an innocent explanation." *State v. Alverez*, 2006 UT 61, ¶ 14, 563 Utah Adv. Rep. 10 (quoting *Terry*, 392 U.S. at 22)). Instead, "courts must look to the 'totality of the circumstances' to determine whether, taken together, the facts warranted further investigation by the police officer." *Id.* (quoting *United States v. Arvizu*, 534 U.S. 266, 274 (2002).

Nor may courts insist that the facts and circumstances conclusively demonstrate that criminal conduct is in fact occurring or about to occur. "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243, 245 (1983). The likelihood of criminal activity is even less in the case of reasonable suspicion, "and it falls considerably short of satisfying a preponderance of the evidence standard.'" *Id. Alverez*, 2006 UT 61, ¶ 14 (quoting *Arvizu*, 534 U.S. at 274). Accordingly, "[a] determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct." *Arvizu*, 534 U.S. at 277. Indeed, "innocent behavior frequently will provide the basis for a showing of probable cause," *Illinois v. Gates*, 462 U.S. 213, 243, 245 n.13 (1983), and, of course, reasonable suspicion as well. All that is required

is that the officer's suspicion be "supported by specific and articulable facts as well as any rational inferences drawn from those facts." *Alverez*, 2006 UT 61, ¶ 14.

As demonstrated above, the facts and inferences drawn from those facts supported such a suspicion. While the conduct and activity of defendant and Straugh might have been innocent, the converging circumstances and their conduct, when viewed together, "warranted further investigation" by Officer Anderson. *Id.*

The questioning of the men in *Terry v. Ohio* was based on less. The officer in *Terry* observed two men standing at the corner of a downtown intersection at 2:30 in the afternoon. *Terry*, 392 U.S. at 5. One of the men walked down the sidewalk past some stores, then paused for a moment to look into a store window, before proceeding a short distance farther. *Id.* at 6. The man then turned around, looked briefly in the store window again, and rejoined his companion at the corner. *Id.* After the two men briefly conversed, the other man followed the same ritual. *Id.* Each of the men repeated this conduct five to six times. *Id.* Although the officer had no information about the individuals, and observed them do nothing wrong, the U.S. Supreme Court concluded that the officer was warranted in stopping to question the men. *Id.* at 27-28. Observed the Court, "It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further." *Id.* at 23.

Likewise, it would have been poor police work indeed for Officers Anderson and Archuletta to have failed to investigate defendant and Straugh further for drug

involvement. Both were known to be involved in drugs, they were seen at an area where drug activity was a real problem, and they were seen doing something at the driver's door—a place where drugs are often concealed. Given these facts, the officers questioning was not based on "an 'inchoate and unparticularized suspicion or hunch,'" but rather on specific and articulable facts. *See Alverez*, 2006 UT 61, ¶ 14.

Defendant argues that the officers were not justified in relying on past criminal histories of drugs and theft or burglary to support their suspicion and cites rule 404, Utah Rules of Evidence, as support. Aplt. Brf. at 13. However, rule 404 applies to actions and proceedings in the courts, not to an officer's analysis of facts on the scene. *See* Utah R. Evid. 1101(a).[5] Utah courts have questioned whether a defendant's criminal history may be considered in assessing probable cause. *See State v. Brooks*, 849 P.2d 640, 644 (Utah App. 1993); *State v. Ranquist*, 2005 UT App 482, ¶ 8 n.2, 128 P.3d 1201. Those cases, however, should be overruled.

As observed by the Tenth Circuit, "[t]o be sure, . . . a prior criminal history is by itself insufficient to create reasonable suspicion." *United States v. Santos*, 403 F.3d 1120, 1132 (10th Cir. 2005). However, "in conjunction with other factors, criminal history contributes powerfully to the reasonable suspicion calculus." *Id.*; *accord United States v. Artez*, 389 F.3d 1106, 1114 (10th Cir. 2004) (holding that "criminal history, combined with other factors, can support a finding of reasonable suspicion or probable cause"). Other courts have likewise recognized that criminal history is

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[5] Rule 1101 also specifically provides that the rules of evidence do not apply to search warrants. Utah R. Evid. 1101(b).

an appropriate factor in assessing reasonable suspicion or probable cause. *See, e.g., United States v. Bynum*, 293 F.3d 192 (4th Cir. 2002) (recognizing that suspect's "prior criminal activity or record clearly is material to the probable cause determination"); *United States v. Taylor*, 985 F.2d 3, 6 (1st Cir. 1993) (same); *United States v. Sumpter*, 669 F.2d 1215, 1222 (8th Cir. 1982) (recognizing that "an individuals' prior criminal activities and record have a bearing on the probable cause determination"). The United States Supreme Court has also suggested that criminal history is a relevant and permissible consideration in assessing reasonable suspicion. *See, e.g., Ybarra v. Illinois*, 444 U.S. 85, 93 (1979) (rejecting claim that officers had basis to conduct a weapons frisk where officers "neither recognized [defendant] as a person with a criminal history nor had any particular reason to believe that he might be inclined to assault them" and did not see him give any "indication of possessing a weapon").

Citing *State v. Alexander*, 797 P.2d 431 (Utah App. 1990), defendant also contends that his nervous conduct should be given no weight. Aplt. Brf. at 12-13. While nervousness alone is not sufficient to establish reasonable suspicion or probable cause, *State v. Humphrey*, 937 P.2d 137, 143 (Utah App. 1997), it is a factor to be considered with other factors. *See Alverez*, 2006 UT 61, ¶ 23 (considering defendant's nervousness in determining whether there was probable cause to believe he had drugs in his mouth). In any event, defendant was not merely nervous, but evasive. The U.S. Supreme Court has expressly recognized that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

Defendant also contends that the pickup's location in an area frequently used to transact drug deals is not a factor. Aplt. Brf. at 13. Again, defendant's claim is contrary to Supreme Court precedent. As observed in *Illinois v. Wardlow*, "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." *Wardlow*, 528 U.S. at 124. The Court in *Wardlow* thus relied on the defendant's presence "in an area of heavy narcotics trafficking," together with his flight upon seeing the officers, in concluding that reasonable suspicion existed to stop the defendant for questioning. *Id.* at 124-26.

Defendant further contends that the trial court erred in relying on the officer's observation of the unhooked amplifier, rolling papers, plastic baggies, and marijuana pipe, because those items were not observed until after Officer Anderson began questioning Straugh about his presence at the Riverside Motel. Aplt. Brf. at 14. He also challenges the trial court's finding that these items were found less than two minutes from the time dispatch verified the license and registration information. Aplt. Brf. at 15. These complaints, however, are irrelevant because Officer Anderson's questioning was already supported by reasonable suspicion. Indeed, these additional observations added to his suspicion, creating the probable cause necessary to justify a search of the car. *See, e.g., State v. Maycock*, 947 P.2d 695

(Utah App. 1997) (finding probable cause to search car based on officer's observation of clip, pipe, and marijuana smell).[6]

II. THE OFFICER'S ROADSIDE SEARCH OF DEFENDANT'S COIN PURSE WAS SUPPORTED BY PROBABLE CAUSE THAT HE PERSONALLY POSSESSED DRUGS

In his final argument, defendant contends that Officer Archuletta was not justified in opening his coin purse after discovering it in his jacket during the weapons frisk. Because Officer Archuletta testified that he had no basis to believe a weapon was contained in the purse, R. 37: 41-42, the State agrees that he was not justified in opening the purse pursuant to a *Terry* frisk for weapons. However, contrary to defendant's claim, the officers had probable cause to believe defendant had contraband in the purse at the time they opened the coin purse.

The law is well settled that "a person's mere propinquity to others independently suspected of criminal activity does not, *without more*, give rise to probable cause to search that person." *Ybarra*, 444 U.S. at 91 (emphasis added);

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[6] In any event, the trial court's findings were not clearly erroneous. As defendant acknowledges, following the license and registration verification, Officer Anderson began questioning Straugh at approximately 3:15:35 a.m. Aplt. Brf. at 15. Officer Anderson mentions the amplifier less than a minute later. *See* V3:16:18-23. He mentions the rolling papers at 3:17:49 a.m, two minutes and 14 seconds after initiation of the conversation. V3:17:49. However, Officer Anderson began looking in the armrest area of the driver side door some 19 seconds earlier, and is clearly seen looking at the armrest seven seconds earlier. *See* V3:17:30. Where Officer Archuletta testified that he saw the rolling papers first and alerted Officer Anderson of their presence, the trial court could reasonably find that the rolling papers were in fact observed in less than two minutes.

accord United States v. Di Re, 332 U.S. 581, 587 (1948) ("We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled."). But the officers here had more. In addition to the evidence of drug use in the pickup truck and defendant's drug past, defendant had made furtive movements while talking to Officer Archuletta. Defendant moved "a black looking basket weave leather" object from one side of the pocket of his hoody to the other side and refused to identify what it was or remove his hands from his pocket. R. 37: 24-25, 27-28, 37. Although Officer Archuletta initially believed the object may have been a weapon, the weapons frisk revealed that it was not. This revelation in turn supported an inference that defendant was not attempting to hide a weapon, but drugs. This inference was strengthened when, in the course of frisking defendant, Officer Archuletta smelled "a real pugnant odor of marijuana" on defendant's person. R. 37: 10.

The foregoing factors created probable cause that defendant was personally concealing marijuana or other drugs in the coin purse. The fact that the officers may not have had "specific knowledge" defendant was concealing drugs "is not critical since 'a police officer is not required to meet any such standard of perfection as to demand an absolutely certain judgment before he may act.'" *State v. Spurgeon*, 904 P.2d 220, 227 (Utah App. 1995) (citation omitted). Accordingly, the roadside search of the purse was justified. Because defendant was traveling in a truck on the road, it was impractical and thus unnecessary for officers to secure a warrant. Accordingly, the exigencies of the situation justified a search under the automobile exception to

the warrant requirement. *Cf. Ybarra*, 444 U.S. at 93 (holding that police executing search warrant on tavern did not have probable cause to extend search to a tavern patron where patron "made no gestures indicative of criminal conduct, made no movements that might suggest an attempt to conceal contraband, and said nothing of a suspicious nature to the police officers").

The facts also created probable cause to support defendant's arrest for possession or use of marijuana. He smelled of marijuana and a marijuana pipe and rolling papers were found in the vehicle. *See Spurgeon*, 904 P.2d at 227 (recognizing that "'probable cause for arrest may arise from an officer's sense of smell'"). Although the pipe and rolling papers may very well have belonged to Straugh, the odor of marijuana on defendant, together with his furtive gestures, strongly suggests that he was using marijuana with Straugh. *See* Utah Code Ann. § 58-37-2(1)(ee) (West 2004) (defining "possession" or "use" as "the joint or individual . . . control . . . , inhalation, . . . or consumption" of drugs). As observed in *Wyoming v. Houghton*, "a car passenger . . . will often be engaged in a common enterprise with the driver." 526 U.S. 295, 304 (1999).

The trial court thus correctly ruled that the search of the coin purse was justified as incident to arrest. The arrest was supported by probable cause, the coin purse was within defendant's "immediate control," and "the search [was] conducted contemporaneously to the arrest." *State v. Giron*, 943 P.2d 1114, 1117-18 (Utah App. 1997). Although the search preceded the arrest, the contemporaneous requirement is satisfied if the search immediately precedes the arrest "and probable

cause to effect the arrest . . . exist[s] 'independent of the evidence seized in the search.'" *State v. Amirkhizi*, 2004 UT App 324, ¶ 19, 100 P.3d 225. As discussed above, those requirements were met.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm the trial court's order denying defendant's motion to suppress.

ORAL ARGUMENT

The State requests oral argument. "[O]ral argument is a tool for assisting the appellate court in its decision making process," *Perez-Llamas v. Utah Court of Appeals*, 2005 UT 18, ¶ 10, 110 P.3d 706, and "the only opportunity for a dialogue between the litigant and the bench." *Moles v. Regents of Univ. of Cal.*, 187 Cal. Rptr. 557, 560 (Cal. 1982). In the case at bar, the decisional process would "be significantly aided by oral argument." Utah R. App. P. 29(a)(3).

Respectfully submitted December 21, 2006.

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Utah Attorney General

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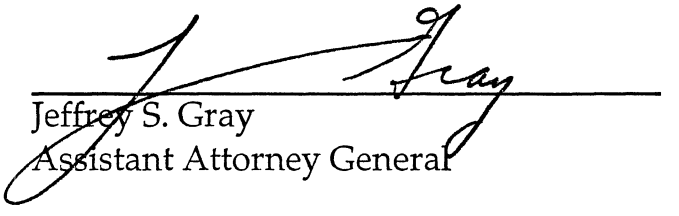
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2006, I served two copies of the foregoing Brief of Appellee upon the defendant/appellant, Michael W. Dennis, by causing them to be delivered by first class mail to his counsel of record as follows:

Samuel S. Bailey
220 East 200 South
Price, UT 84501



Jeffrey S. Gray
Assistant Attorney General

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ADDENDUM

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IN THE SEVENTH **DISTRICT** COURT OF CARBON COUNTY
STATE OF UTAH

THE STATE OF UTAH,	)	
	)	**ORDER ON MOTIONS TO**
Plaintiff,	)	**SUPPRESS**
vs.	)	213-10-05 & 212-10-05
	)	
MICHEL W. DENNIS,	)	Criminal No. 051700285
BRIAN GABRIEL STRAUGH	)	Criminal No. 051700283
Defendant.	)	

Defendant Straugh moved to suppress evidence by a Motion dated February 14, 2006. The cases on defendant Straugh and defendant Dennis, though charged in separate criminal Informations, arise out of the same traffic stop. Defendant Dennis joined in the Motion to Suppress filed by defendant Straugh, and a Suppression Hearing was conducted on March 20, 2006. Officers Trent Anderson and Lynn Archuleta of the Helper City Police Department testified at the hearing. The Court, having heard the evidence and the arguments of counsel, now finds as follows:

On October 18, 2005, at approximately 3:00 a.m. Officer Trent Anderson and Officer Lynn Archuleta of the Helper City Police Department were on duty and were parked along SR6 with the driver's side doors next to one another. Officer Anderson observed a black pick up truck approaching a stop sign on a street which enters SR6. Officer Anderson noticed that the vehicle did not stop for the stop sign. As the truck passed the location of the officers, Officer Anderson noticed that the vehicle had a cracked windshield. Officer Archuleta commented to Officer Anderson that Archuleta had seen the truck earlier at the Riverside Motel, a location known for unlawful drug activity.

Officer Anderson stopped the truck. He approached the vehicle and found the driver to be defendant Brian Straugh. The only other occupant of the vehicle was defendant Michael Dennis. While speaking with Straugh, Officer Anderson detected extreme nervousness coming from both subjects. Officer Anderson knew both subjects and had prior knowledge that both had been involved with burglaries, thefts, or narcotic violations.

Officer Anderson returned to his patrol vehicle to run a license check on Straugh. Officer Anderson was unable to run the check through the Helper Police Department because of difficulties with the computer equipment, so he ran the check through Carbon County Dispatch. Dispatch was slow responding, and roughly eight (8) minutes passed until Officer Anderson received information from Dispatch that Straugh's license was valid. During this time, Officer Archuleta had responded to the scene and had proceeded to Officer Anderson's vehicle.

Immediately upon receiving the license information from Dispatch, both Officers approached the truck. Officer Anderson asked Straugh if Straugh had been at the Riverside Motel. Officer Archuleta observed zig zag rolling papers in the driver's door handle and alerted Officer Anderson. Officer Anderson then saw the papers and also a green tubular object underneath the papers which appeared to be drug paraphernalia. The Officers also inquired about an amplifier which was loose on the floor of the vehicle. While Officer Anderson was speaking with Straugh, Officer Archuleta noticed that Dennis had a black object with a basket weave pattern which Dennis was attempting to conceal in the front pocket of a sweatshirt Dennis was wearing. Dennis and Straugh were removed from the vehicle. Officer Anderson then observed two (2) plastic baggies commonly used to store narcotics on the floorboard of the vehicle. Dennis was uncooperative about revealing the black object. Officer Anderson attempted to pat down Dennis. When Dennis attempted to pull away, Officer Archuleta grabbed the item from his pocket. The object was a coin purse. Officer Archuleta opened the purse and discovered baggies of suspected methamphetamine and other contraband.

The video tape from Officer Anderson's patrol vehicle was played during the Suppression Hearing. The Court took note of times shown on the video. Less than two (2)

minutes elapsed from the time that the Officers received the license response from dispatch until the Officers noticed in plain view the zig zag papers, green paraphernalia, and the amplifier.

Based on the aforesaid findings, the Court concludes that Officer Anderson had a valid reason to make the traffic stop. The delay of roughly eight (8) minutes while Officer Anderson did a standard driver's license check with Dispatch was not improper. When Officer Anderson approached the truck for the second time together with Officer Archuleta, Officer Anderson immediately asked Straugh about being at the Riverside Motel. This was an improper question and not related to the traffic stop, but Straugh had no need to answer the question. The Officers had legitimate factors at this juncture for reasonable suspicion, namely that it was 3:00 in the morning, that they knew the subjects and that the subjects had criminal histories, that the subjects had been at the Riverside Motel, and that the subjects were acting nervous. These factors, while being reasons for suspicion, carry minimal weight. However, the Officers were certainly justified in inquiring about the loose amplifier based on their knowledge of the defendants' backgrounds, the fact that the amplifier was not hooked up, and the time of day. Additionally, the Officers also saw the zig zag papers and the green paraphernalia.

The detention of the subjects was less than two (2) minutes before the Officers had their reasonable suspicions aroused by the amplifier, the zig zag papers, the green paraphernalia, and loose baggies on the floor of the vehicle. This brief detention of the subjects was not an unreasonable extension of time beyond the time needed for issuance of a traffic citation.

As to the black coin purse in the possession of Dennis, a reasonable, objective officer would have been justified in pursuing what was in Dennis's sweatshirt pouch. The black, basket weave object was not unlike the handle of a gun, the handle of a knife, or a holster for a gun or knife. It was reasonable for Officer Archuleta to insist that the purse be taken from the sweatshirt pouch.

It was unnecessary for the Officers to secure a Search Warrant to open the purse, since it was apparent from the evidence that the subjects were going to jail and the contents of the purse would be discovered either through an inventory or through inevitable discovery.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motions to Suppress are denied and any contraband found in the vehicle or on defendant Dennis is admissible at trial.

DATED this 17th day of April, 2006.

BY THE COURT:

SCOTT N. JOHANSEN, Judge

STATE OF UTAH
SEVENTH JUDICIAL DISTRICT